IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22346

HARRY S. STONEHILL AND ROBERT P. BROOKS, *Appellants,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal From the United States District Court for the Central District of California

APPELLANTS' REPLY BRIEF

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OPINION BELOW AND JURISDICTION

The sections entitled "Opinion Below" and "Jurisdiction" in Appellee's brief do not differ substantially from those in the brief submitted by Appellants.

QUESTIONS PRESENTED

The "Questions Presented" as formulated by Appellee are not the questions presented on this appeal. As stated by Appellee, the questions assume findings of fact not made by the trial Court (proposed Question #1, G. Br. 2*) and introduce issues not raised below (proposed Question #2, G. Br. 2); (proposed Question #3, G. Br. 3).

STATEMENT IN REPLY

Appellee's "Statement" contains a great number of omissions and distortions. Because of space limitations, imposed by Rule 18(g)(4) of the Rules of this Court, only a few of them can be met below:

* Appellee's brief will hereafter be referred to as Government's Brief, (G. Br. —).

a. U. S. Investigation of Appellants' Tax Liabilities Prior to the Raids

Appellee claims in its "Statement" that no United States investigation of Appellants was commenced until after the unlawful raids of March 3, 1962. Appellee goes so far as to contend that the U. S. investigation of Appellants did not begin until March 8, 1962, when Special Agent Powers arrived in Manila and the case was formally assigned to him (G. Br. 6)—if not until two weeks later, when a fraud jacket was officially opened in Washington. (G. Br. 17). Appellee further contends that a Philippine investigation of Appellants preceded all U. S. interest in Appellants and was begun in 1959 or 1960 and that this Philippine investigation continued and was the cause of the illegal raids (G. Br. 7, 8), with the United States an uninvolved and innocent bystander.

The facts and the evidence are to the contrary:

(i) *"IRS (Internal Revenue Service's) interest in the above captioned taxpayer [Appellant Stonehill] begins as far back as 1954".* Thus Chandler wrote to Washington on December 22, 1961 [Pl. Exh. 11, line 1].

(ii) As of August 31, 1960 a considerable number of items relating to Appellant Stonehill were in the files in Manila and a "fairly substantial file" relating to Appellant Stonehill was being kept in the Washington I.R.S. Office in its "O:PO:F:O" section [Def. Exh. A].

(iii) All of Chandler's work, from the middle of December through January, February and until Powers' arrival on March 8, was devoted exclusively to investigative activities with regard to Appellants (Tr. 112, 113, 122, 126, 139, 271, 273, 447 et seq.).* (Def. Exh. E). This investigative activity included ascertaining the locations of Appellants' financial records for later seizure (Tr. 991). Chandler as Internal Revenue Representative in the Far East was the "top dog" in the Far East (Tr. 66), authorized to make investigations on all Internal Revenue matters that "ARISE in the area" (Tr. 66, 69).

Appellee's contention (G. Br. 6, 7, footnote 5) that Chandler's, Reynold's, and, later, Ragland's work on this case in December, January, February and early March,

* Tr.—Transcript of Hearing.

prior to the arrival of Special Agent Powers, does not constitute "investigative activity of the taxpayers' liabilities" (G. Br. 6, footnote 5), because Chandler did not *formally* assign such investigation to anyone under him, ignores evidence and reality.

b. There Was No Antecedent Phillippine Investigation of Appellants

Appellee states: "At the beginning of February of 1962 the 'then' Secretary of Justice, Jose Diokno, became involved *with the investigation of the taxpayers by the NBI*" (G. Br. 9). (Emphasis supplied.)

No "investigation" of the taxpayers by the NBI was in progress when Diokno (who had been in office for less than a month) [Pl. Exh. 12, p. 13] became involved. At the January 27 meeting, when Chandler told Lukban that he (Chandler) already had asked for additional U. S. agents to help him on his Stonehill investigation, Colonel Lukban *"promised"* Chandler and Hawley that he *would* (in the future) inquire into the Spielman allegations and, if Mr. Spielman's story was found to be correct, he *"would"*, then investigate Stonehill. (Tr. 143). Having promised Chandler to investigate, Lukban asked for Diokno's approval before he even began to investigate Appellants. (Pl. Exh. 12, p. 14).

c. Diokno Did Not Decide on Raids—He Approved Lukban's Decisions, Which Had Been Arrived at in Consultation With U. S. Officials

Appellee states:

> "Around the time of the Hong Kong trip by Secretary Diokno, Secretary Diokno 'decided' to have the taxpayers arrested and their companies' business premises raided in connection with the NBI's investigation." (G. Br. 9). (Emphasis supplied).

The record shows that raids* were discussed between Chandler and Secretary Diokno before the February 12 visit to Hong Kong (Tr. 985, Chandler). Raids were again discussed in Hong Kong with Kennedy's assistant (Tr. 167-

* Raids were planned and carried out against residences as well as offices. (See Exh. AW).

Chandler). Diokno told Seigenthaler that the raids would not be through "ordinary government channels" (Exh. AZ).

Diokno never decided on raids. Diokno only approved Lukban's plans for the raids which plans Lukban and his assistant director, Nocon, had worked out with Chandler at the meetings at Chandler's house. (Tr. 278, 279, 280) (Pl. Exh. 12, page 29).

d. Chandler and the Pre-Raid Briefing at Colonel Lukban's Home

Appellee's statement:

> (i) "On the night of March 2, 1962, Mr. Chandler was contacted by an aide of Colonel Lukban who requested that he see Colonel Lukban at his home (Tr. 1066). Upon reaching Colonel Lukban's house, he found a large number of NBI personnel there speaking the Tagalog language." (G. Br. 10).

With regard to the same meeting, Chandler testified (Tr. 313):

> "The Court: This was in the Philippines?
> A. Yes, sir.
> The Court: The language is Spanish, isn't it?
> A. No, your Honor. It's English.
> The Court: Do they all talk English?
> A. Yes.
> The Court: And did this conversation all occur in English?
> A. Yes, sir."

(ii) Appellee tries to give the appearance of innocent small talk to a most important incident when Chandler, on the morning of the raids, approved in advance the language of the warrants delineating the type of evidence to be seized (G. Br. 10).

The evidence shows that Colonel Lukban read to Chandler the specific section of the warrants which described *what was to be* seized. (Tr. 312). This language—identical on all warrants—uniformly called for the seizure of evidence important only to the U. S. tax investigation (Exhs. M-Z, AA-AL).

Chandler had explained to Lukban, Diokno and Del Rosario the need for this type of evidence prior to the raids. (Tr. 328, 847, 848).

e. The Selection by Chandler of the Army Navy Club as Raid Target

Again Appellee tries to minimize and gloss over an important incident of instigation and participation, which occurred at the same team leader's briefing session the night before the raids. Its Brief claims:

> (i) "Mr. Chandler testified that he did not answer any questions of the NBI team leaders concerning these raids at Colonel Lukban's house, and from his observation, their presence at Colonel Lukban's house was of a social nature. . . "
> (G. Br. 12).

and

> (ii) "Mr. Chandler did not know what premises were going to be raided or how many search warrants were going to be issued; however, *'out of curiosity'* [emphasis supplied] Mr. Chandler inquired as to whether the NBI intended to include some premises at the Army-Navy Club, rented by a Karl Beck, in the raid." (G. Br. 11).

But here is what Chandler did do on this "social" occasion, the night before the raids:

> "Q. Did you give any advice or any request to [Assistant NBI director] Nocon?
> A. Yes.
> Q. All right. What did you say to him?
> A. Well, he finished typing these warrants, as he called them, and he counted them and I asked him casually did he have the—he counted them and said so many.
> Q. Do you remember how many he said?
> A. I have a recollection of 24, I don't know why, but then I said, asked him, 'Does that include the Army-Navy Club?' He said, 'No'.
> Q. What did you say then, if anything?
> A. *Well, I told him I thought that was a place they should go to.'"** (Emphasis supplied). (Tr. 1009).

Chandler requested the search of this location not out of "curiosity" but only after he had made his own careful personal investigation by going there (Tr. 346). He had

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* "Whereupon it appears that the Army-Navy Club premises were included in the raid". (G. Br. 11).

received the lead to this all important location of Appellants' private and confidential papers from Spielman (Tr. 345).

f. When Chandler, Reynolds and Ragland Joined Lukban in his Office, Raids Were Still in Progress

> "At about 10:00 p.m., . . . [M]essrs. Chandler Ragland and Reynolds went to Colonel Lukban's office and . . . were given to understand, at that time by Colonel Lukban, that the raids had been accomplished, although the NBI remained in possession of many of the raided premises. * * *" (G. Br. 14).

Chandler was not given to understand that the raids had been concluded. On the contrary, Lukban specifically indicated to Chandler that the agents were still searching various premises (Tr. 401).*

g. The United States Agents Physically Searched Premises, Selected and Seized Evidence While the Raids Were in Progress

Appellee's statement:

> ". . . While they were there [at Lukban's office] an NBI agent entered and told Colonel Lukban that he had *seized* a large volume of corporate records at a warehouse of the United States Tobacco Corporation." (G. Br. 14) (Emphasis supplied).

The NBI agent had "encountered" (not seized) a large quantity of records (Tr. 339). Some of these records were later seized by the U. S. Agents. In an attempt to minimize this actual seizure conducted by the U. S. agents during the raids, the government in its statement describes it as follows:

> "Messrs. Chandler, Reynolds and Ragland were taken to the warehouse by an NBI agent and they found there a large quantity of old corporate records in a storage area; they pointed out an old general ledger of the corporation and some supporting books as being the more significant records from an accounting point of view and they left. They made no detailed examination of these records, they took no records with

* Raids continued for several days after March 3 (Tr. 863).

them, they do not know what the Philippine authorities did with them, and they have never seen these old records since." (G. Br. 15).

Actually, according to Chandler's own testimony, Chandler and the other two U. S. agents selected and seized what *they* thought was important.

"A. I think that anything we thought was of any—was important, we put into a cardboard carton there.
The Court: You say "what we thought". Now, what do you mean by "we"?
A. Myself and the other agents.
The Court: That is United States agents?
A. Yes.
The Court: How many were there at that time?
A. There were three of us.
The Court: And when you say "we", you include all three?
A. Yes." (Tr. 406).

Obviously, what the United States agents thought important must have been what was important to the U. S. case. Neither Ragland, Reynolds, nor Chandler, knew what kind of evidence (if any) the Philippine authorities were looking for.

Again, according to Chandler, whatever they thought was important, they (the U. S. agents) put into cartons.* True, they did not take the records with them, but they told the NBI agents to take the material they had selected to headquarters, where they would later copy it, in accordance with their antecedent agreement with Lukban. The reason that these three agents did not see the records again, is that another agent, Leyden, was sent to Manila to analyze and copy this type of record. Throughout Chandler's presence at this location, the NBI agents were still searching and, in fact, consulted Chandler (Tr. 649). Chandler himself searched the entire warehouse, looking for (among other things) cigarette paper (Tr. 650) because "Spielman had talked a great deal about it" (Tr. 410). While Chandler, Ragland and Reynolds selected records,

* None of the records selected by the U. S. agents (as Mr. Chandler testified in response to a question by the Court) had been moved from the place where they were originally found (Tr. 409-410).

"the NBI's . . . kept on searching the place" (Tr. 650), i.e., the raids were far from concluded.

In order to explain the continued presence of the NBI agents after the U. S. agents had left, Appellee states that "the NBI retained possession of many of the corporate premises for several years, including the premises of United States Tobacco Company." (G. Br. 14).

Again the record is misquoted. The witness in question stated that U. S. Tobacco Corporation was closed for two weeks and, after re-opening, operated for two years "under *Government* (not NBI) control" (Tr. 610, 611). There is no evidence whatever that the NBI kept possession or control of U. S. Tobacco Corporation, and as a matter of fact, it did not.

The above selections are mere examples, significant of Appellee's attempts to minimize the gravity of the U. S. actions in Manila. To make a complete analysis of all omissions and misstatements in Appellee's "Statement" would require more space than is available. Suffice it to add that Appellee in its "Statement" completely failed to recite any facts which would provide an innocent explanation of Mr. Chandler's written instructions to the NBI as to where to search and what to seize (Exhs. I and J). Appellee's argument that excise tax stamps (one of the items Chandler specified for seizure on Exhibits I and J) had nothing to do with the U. S. tax case (G. Br. 49) does not stand up. The core of Appellee's net worth case is that the "likely source" for Appellants' net worth was the sale of untaxed cigarettes bearing illegal stamps. (Pl. Ex. 11, p. 3).

Chandler wanted this very evidence. He expected that the instructions contained in Exhibits I and J as to where to find it, would be used in the raids (Tr. 366).*

Appellants, for the Court's convenience, have attached as Appendix to this Reply Brief a chronology, reciting the most important events bearing on the issues in this case. It points up how many facts were omitted or glossed over in Appellee's Statement.

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* The Court is also referred to pages 10 and 11 of our main brief in this connection, showing Chandler's own admission that he had seen a picture folder prepared by the NBI prior to the raid (Tr. 341) and that the words, "Comments on USTC picture folder" may well have been written by him while he looked at it. (Tr. 1076).

SUMMARY OF ARGUMENT

A. THE LAW

1. There is no authority for Appellee's contention that federal "participation" in an illegal search must be "substantial" to require suppression. Nor is there authority for Appellee's argument to the effect that such "substantial" federal "participation" requires (a) the presence of the federal agent at the initiation of the raid and seizure; (b) the examination and sifting of articles turned up by the search and (c) a decision by him as to what evidence must be seized and retained for use in the subsequent federal prosecution. The quantum of "participation" required by the Courts for application of the Fourth Amendment to foreign searches is, that it goes beyond "mere" or "incidental" participation. Yet, even applying Appellee's standards, the facts in the instant case spell such "substantial participation" as to require reversal of the holding of the District Court.

2. Appellee's reliance on Rule 52(a) F.R.C.P. is misplaced. Certain of the trial Court's findings of fact (see Appellants' Opening Brief, pp. 45, 46) are not in issue. It is the trial Court's *misinterpretation* of these facts and its disregard of other evidence that this Court is asked to review and to reverse.

This Court is free to do so, unfettered by Rule 52(a). *Stevenot* v. *Norberg,* 210 F. 2d 615 (C.A. 9, 1954); *Sears, Roebuck & Co.* v. *Johnson,* 219 F. 2d 590 (C.A. 3, 1955). The decision of the Court below rests solely on its finding of ultimate "fact", which actually constitutes a conclusion of law,* to the effect that there was no instigation of the raids within the purview of *Brulay* v. *U.S.,* 383 F. 2d 345.

As to the few findings of intermediate fact that the Trial Court made in apparent support of its erroneous conclusion of law that there was no "instigation" or "participation" within the purview of *Brulay,* supra (enumerated on p. 55 of our Main Brief), it has been shown that these findings were clearly erroneous and unsupported by the evidence

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* The Trial Court in its opinion did not make formal Findings of Fact and Conclusions of Law. Thus its findings and conclusions are not so labeled, or separately stated by the Court.

and therefore must be set aside by this Court under Rule 52 F.R.C.P.

3(a) Appellee did not raise in the District Court the issue as to whether suppression of illegally seized evidence lies in civil cases. The trend of the cases cited in our main brief and current Government policy is to the effect that suppression does apply in civil cases and particularly in cases involving penalties.

3(b) Appellee's reliance on *Walder* v. *U.S.*, 347 U.S. 62, 74 S. Ct. 354 (1954) as an authority which would permit the use of illegal evidence to contradict Appellants' tax *returns,* is misplaced. *Walder* permits no more than impeachment of the *credibility* of a defendant who has taken the stand in a criminal case.

4. Appellants have "standing" to move for suppression because most (if not all) of the records seized were their personal records, and/or were seized in their personal offices and held by appellants in their personal capacity. The fact that some of these records were located and seized in the offices of corporations managed, owned or controlled by Appellants, does not deprive Appellants of "standing". *Jones* v. *U.S.*, 362 U.S. 257 (1960); *U.S.* v. *Cohen,* 388 F. 2d 464, C.A. 9 (1967).

B. THE FACTS

In its reply brief, Appellee, unable to explain away the overwhelming evidence of U. S. instigation of, and participation in, the raids of March 3, 1962, attempts to diminish the impact of this evidence (and at the same time to support an erroneous finding of the trial court) by suggesting that the raids were the result of a pre-existing Philippine investigation, allegedly begun by Philippine authorities sometime in 1960 for the purpose of deporting Appellants. The only support relied on by Appellee for this phantom investigation by Philippine authorities are references to one or more hearsay statements made by Senator Diokno in a deposition. Appellee, despite its excellent relations with the NBI, produced no documentary evidence, no details, no statement even, as to what charges, if any, had been investigated.

Nothing but vague hearsay, inadmissible in evidence and contradicted by the facts.

Appellee's entire brief relies primarily on Diokno*—a weak reed, indeed. For Diokno is a man whose motives for testifying** and credibility are clearly impeached on record.

There was no pre-existing Philippine investigation of Appellants. On the contrary, it was the United States which, since 1954, "had an interest" in Appellants and which, on January 9, 1960, when Diokno had hardly taken office, and before Lukban had lifted a finger, had decided to "get Appellants out of the Philippines and to keep them out" (Exh. E).

The Philippine investigation began in early February only after Colonel Lukban, who on January 27 was persuaded to initiate it, had received approval from Diokno to do so.

The actions of the U. S. agents in taking part in the planning of the raids, after having obtained an agreement to be given access to the fruits thereof, and their physical part in the raids while they were in progress were not—as Appellee urges—actions of innocent bystanders who, according to Appellee's brief, at worst were trying to accommodate a foreign government in unconstitutional actions against U. S. nationals. They constituted instigation of, and participation in, these illegal raids, in a manner shocking to the conscience of the Court and entitling Appellant to suppression.

ARGUMENT

A. THE LAW

1. Federal Participation Is Not Required To Be "Substantial", To Invoke the Exclusionary Rule

The trial Court initially intended to hold that the Fourth Amendment prohibits the use in federal Court of evidence obtained through an illegal search, regardless of whether

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* There are approximately 50 references to the Diokno deposition (Plaintiff's Exhibit 12) in the reply brief.

** Despite an attempt by U.S. officials to save him, Diokno was fired in early May by President Macapagal after (and because of) the raids (RT (878-880).

federal officers participated in such search* (274 F. Supp. at p. 426). Its denial of the motion to suppress was based solely on this Court's decision in *Brulay* v. *U. S.*, 345 F. 2d 383 (ibid.). But *Brulay* does not lay down any rule as to the amount of U.S. instigation of, or participation in, a foreign raid required to bring about application of the exclusionary rule, because in *Brulay* there truly was no Federal involvement of any kind, not even "bare" or "mere" participation by Federal officers in the Mexican search. Nevertheless, there are guidelines in this Circuit as to amount of participation required. They are not what Appellee contends them to be.

Corngold v. *U. S.*, 367 F. 2d 1 (C.A. 9, 1966), (search by TWA employees in which U.S. federal agents participated) provides one guideline. The facts in the instant case fit the *Corngold* pattern. (See Appellants' Opening Brief, beginning at p. 43). This Court's citing *Birdsell* v. *U.S.*, 346 F. 2d 775 in *Brulay* provides another: conduct of Federal officers abroad which will shock the conscience of a federal Court requires suppression. The conduct of the U.S. embassy contingent in Manila was certainly such that it must shock the conscience of this Court (See Chronology, Appendix, *infra,* Appellants' Opening Brief, p. 73).

But nowhere has this Court promulgated a rule even resembling the one contended for by Appellee, namely, that an agent of the United States must so "*substantially*" participate** in a non-federal raid as to convert the raid into a joint venture between the United States and the raider. Nowhere has this Court (or any other Court) ruled that, "as used in this sense, 'substantial' participation means: (1) that the federal agent is present at the initiation of the raid and seizure; (2) examines and sifts articles turned up by the search; and (3) in his discretion, decides on the seizure of evidence and his retention of it for use in a subsequent federal prosecution". (G.Br. 22).

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* See Appellants' Opening Brief, beginning at p. 25.

** In urging on this Court that there must be substantial participation, Appellee betrays a justified lack of confidence in the lower Court's holding that there was no participation and no instigation on the part of the United States.

Nor do the cases cited by Appellee support its theory. A brief analysis so shows:

(i) *Byars* v. *U. S.*, 273 U.S. 28 (1927).

In *Euziere* v. *U. S.**, the Court citing and interpreting *Byars* said:

> "The test in all cases is did the federal authorities participate *in any way* in the search? The answer in each case must depend on the facts of the particular case. We must be realistic in our approach to the problem. There may be participation *although the federal agent was not present.* There may be participation even though the federal agent was present. There must in all cases be good faith conduct. *If by tacit agreement or by a course of conduct, it is understood or becomes apparent that the result of a search by state officers is to be turned over to the federal agents, then they participate in the search as fully as though they actively participated therein.*" (Emphasis supplied.)—266 F. 2d at p. 90

This is the true and only criterion under Byars: DID THE FEDERAL AUTHORITIES PARTICIPATE IN ANY WAY?

(ii) *Lustig* v. *United States,* 338 U.S. 74, (1949) 69 S. Ct. 1372.

In *Lustig* the city police gathered up the evidence and eventually turned it over to the Federal officer at police headquarters. (69 S. Ct. at 1373). The Supreme Court held that "it surely can make no difference whether a state officer turns up the evidence and hands it over to a Federal agent . . . or the Federal agent himself takes the articles out of the bag. It would trivialize law to base legal significance on such differentiation." (Ibid., 1374). *Byars* and *Lustig* certainly are not authority for Appellee's theory of "substantial" participation. If they are, then the facts in the instant case spell "substantial" participation under Appellee's theory. Appendices B and C of Appellants' Opening Brief so show beyond a reasonable doubt.

(iii) *Sloane* v. *U. S.*, 47 F. 2d 889 (C.A. 10, 1931).

As in *Brulay, supra,* a Federal officer's call to State police—not "actuated" by an intention to initiate a State

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* 266 F. 2d 88 (CA 10, 1959).

search—was not considered participation or instigation although the case was held to be "very close to the line." The instant case went over and beyond the line.

(iv) *Myers* v. *U. S.,* 49 F. 2d 230 (C.A. 4) is not in point. The search was a legal rather than an illegal search and the prosecution was for a crime committed the day before the search.

(v) In *Shurman* v. *U. S.,* 219 F. 2d 282, as in *Brulay,* narcotics were seized by a State officer outside of any Federal officer's presence after a "tip-off" by Federal officers. The tip preceded the search by seven days. There was no evidence of tacit understanding or custom of cooperation between State and Federal authorities.

(vi) In the two District Court cases, *U. S.* v. *Evans,* 179 F. Supp. 834, and *U. S.* v. *Brown,* 151 F. Supp. 441 (E.D. Va.), evidence was turned over to the Federal officers after the State search. The Federal officers were not present at the search for the purpose of obtaining evidence.

Appellee's authorities simply do not support its theory. None of them speak of "substantial" participation or mention Appellee's criteria for such substantial participation. By citing cases in which Appellee's criteria were absent, Appellee wants this Court to assume that suppression was denied *because* of their absence. This negative-type argument is hardly persuasive.

A great number of authorities, however, clearly and positively spell out that the criteria contended for by Appellee need not be present to invoke the exclusionary rule of the Fourth Amendment.

Forty-one years ago the Supreme Court urged all federal courts to

> "be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods."—Byars v. U. S., 273 U. S. 28 (1927) at p. 32.

In so doing, it did not require the courts to look for "substantial" participation, a joint venture, federal presence, or any one of the other criteria urged by Appellee. It commanded that the exclusionary rule applied in all cases of federal involvement in non-federal searches with

a very limited exception: where the facts do not go beyond "MERE", or "bare" participation.

A plethora of other cases, preceding and following *Byars* in time show the fallacy of Appellee's theory; a few follow:

No Physical Presence of Federal Agent at Location of Raid Is Required Before Suppression Can Be Granted.

(a) *Flagg* v. *U. S.*, 233 F. 481 (C.A. 2, 1916). Arrest by municipal police, who seized defendant's books and records *outside the presence of any Federal officer. After* the seizure, books and records were carted to the Federal building and turned over to Federal officials who worked on them for 18 months, as did Ragland and Powers in the instant case.

(b) *U. S.* v. *Falloco*, 277 F. 75 (DC WD Mo., 1922). No physical presence of Federal officers in the illegal State search: the illegal evidence was turned over to the Federal officers after the search had been concluded.

(c) *Legman* v. *U. S.*, 295 F. 474 (C.A. 3, 1924), City police officers alone made entry. After the search was completed, Federal Prohibition agents entered. The Court held that it was "obvious" that the Federal agents had been informed of what was transpiring and suppressed evidence taken earlier by the State officers and then turned over to the Federal agents.

(d) In *Fowler* v. *U. S.*, 62 F. 2d 656 (C.A. 7, 1932), no Federal officer physically participated in the local search. Evidence was suppressed because of a "general understanding" with Federal Prohibition agents to cooperate and to divide prosecutions.

(e) In *Sutherland* v. *U. S.*, 92 F. 2d 305 (C.A. 4, 1937), the Court, interpreting *Byars*, held that a mere understanding between State and Federal officers, permitting the latter to prosecute offenses which the former discover in an illegal State search was sufficient participation to require suppression, despite lack of physical presence in search by Federal officers. To the same effect are *Gambino* v. *U. S.*, 275 U.S. 310, 48 S. Ct. 137 (1927) and *Ward* v. *U. S.*, 96 F. 2d 189 (C.A. 5, 1938).

(f) In *Anderson* v. *U. S.*, 318 U.S. 350, 63 S. Ct. 599 (1943), the Supreme Court said that *Byars* did not require Federal officers to be "formally guilty of illegal conduct", and suppression was required where "[t]here was a working arrangement between Federal officers and the Sheriff . . . which made possible the abuses revealed by [the] record".

The Federal Agent Need Not Personally Examine, Sift, or Seize Evidence

(a) In *Waldron* v. *U. S.*, 219 F. 2d 37 (C.A.D.C. 1955), evidence seized by State police was suppressed in Federal Court on the authority of *Byars* and *Lustig,* purely because Federal officers "had a hand in [the illegal search] and participated in it as Federal enforcement officers upon the chance that something would be disclosed of sufficient interest to them". [pp. 39-40].

(b) In *U. S.* v. *Hallman,* 365 F. 2d 289 (C.A. 3, 1966), the FBI agent did not make *any* physical search or seize evidence. The evidence was selected and seized by the State officer, yet was suppressed in the Federal Court on the authority of *Byars.*

The Federal Agent Need Not Initiate the Search.

In *Lustig* v. *U. S., supra,* the Supreme Court said:

> "To differentiate between participation from the beginning of an illegal search and joining it before it had run its course, would be to draw too fine a line in the application of the prohibition of the Fourth Amendment as interpreted in Byars v. United States, supra."

No further argument is required to show that the Federal officer need not be present at the beginning of the search or initiate it.

2. Rule 52(a) Does Not Preclude Review by This Court

In *Stevenot* v. *Norberg,* 210 F. 2d 615 (1954), this Court said:

> "When a finding is essentially one dealing with the effect of certain transactions or events, rather than a finding which resolves disputed facts, an appellate

court is not bound by the rule that findings shall not be set aside, unless clearly erroneous, but is free to draw its own conclusions. . . .''—p. 619

The instant appeal primarily concerns the legal effect of the events of record. The lower Court's holding that there was no instigation and participation constitutes a legal determination which this Court may review. In *Lustig* v. *U. S.,* supra, the Supreme Court reviewed *de novo,* whether facts held by the trial and appellate Courts not to constitute federal participation, did, in fact, constitute such participation so as to make the exclusionary rule apply.

Nor is this Court required to accept a trial Judge's findings which are based on secondary or derivative inferences which the trial Judge inferred from the testimony. *American Tobacco Co.* v. *The Katingo Hadjipatera,* 194 F. 2d 449. (C.A. 2, 1951).

Where testimony is adduced by deposition, the appellate Court is in as good a position as the trial Court to evaluate such testimony. *Equitable Life Assurance So. of U. S.* v. *Irelan* (C.A. 9, 1941), 123 F. 2d 462. Appellee's brief relies heavily on the Diokno deposition. This Court has held in *Equitable Life Assurance So. of U. S.,* supra, that it actually has a burden to review findings of fact that might be based on a deposition.

As shown in Appellants' Opening Brief and in this Reply, many of the facts found by the trial Court (as, for instance, that there was an antecedent deportation investigation) are clearly erroneous and not supported by any credible evidence. A complete review of all the lower Court's findings of fact and conclusions of law, therefore, is permitted and indicated in this case.

3. Suppression Lies in Civil Cases

The question whether suppression lies in civil cases is not before this Court. Appellee did not seriously contest applicability below and the trial Court correctly held that the exclusionary rule applies to civil cases (274 F. Supp. at p. 425). Appellants' Opening Brief, beginning at p. 23, shows that decisional trend and government policy support the holding.

Militare v. *Scanlon* (E.D. N.Y.) 17 AFTR 2d 776 (1966) and *Compton* v. *U. S.*, 334 F. 2d 212 (C.A. 4) are not in point. They are cases where a tax assessment was sought to be quashed. The motion under review is not a motion to set aside the assessment herein, but to suppress evidence. If the motion is sustained, Appellee may still attempt to establish a tax liability by untainted evidence.

Walder v. *U. S.*, 347 U.S. 62 (1954) is cited for a novel proposition: it is urged as authority permitting Appellee to use tainted evidence to contradict Appellants' extra-judicial statements on their tax returns. *Walder* permits no more than impeachment of the *credibility* of a defendant who has taken the stand, by illegal but contradictory evidence. It does not, by any stretch of interpretation, permit the use of tainted evidence to disprove or determine a central and substantive issue of the case.

The Supreme Court's decisions in *Escobedo* v. *Illinois*, 378 U.S. 478, 84 S. Ct. 1758 (1964); *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966); *Marchetti* v. *U. S.*, 88 S. Ct. 697 (1968); and *Grosso* v. *U. S.*, 88 S. Ct. 709 (1968), have deprived *Walder* of a great deal of its vitality. (See dissenting opinion of Judge Keating in *People* v. *Stanley Kulis*, 18 NY 2d 318, 221 NE 2d 541, 542.) Because of the clear inapplicability of *Walder* to the instant case, no further argument on this point is needed.

4. The "Standing" Issue

Space limitations do not permit extended argument on this point. The issue was not effectively raised below or waived. In any event, Appellants have "standing" in the instant case regardless of what individual documents are sought to be suppressed. *Jones* v. *U. S.*, 362 U.S. 257 (1960); *Berger* v. *State of New York*, 87 S. Ct. 1873 (1967), 388 U.S. 41; *See* v. *City of Seattle* (1967), 87 S. Ct. 1737; *U. S.* v. *Cohen*, 388 F. 2d 464 (C.A. 9, 1967).

B. THE FACTS

A reading of appellee's argument on the facts shows that Appellee is unable to deny the large scale Federal involvement that spells U. S. instigation and participation in these raids. Appellee has introduced two "red herrings"

to lessen the impact of these facts: (1) that the U. S. did not start its tax investigation of Appellants until after the raids—thoroughly refuted in Appellants' Statement in Reply, *supra;* and (2) that there was an antecedent deportation investigation by the Philippine authorities*.

Because Appellee relies so heavily on the Diokno deposition, a few words have to be said about this deposition and the deponent.

The deposition was first admitted over Appellee's objections. (Tr. 1112). Later the Court procured consent of Appellants' Counsel to its admission without full reading in Court. Appellants' Counsel conditioned this consent on the Court's observing Appellants' objections on the record of the deposition (Tr. 1198).

Most, if not all of the testimony relied on in Appellee's brief was elicited by leading questions, was objected to and was incompetent as hearsay or conclusions.

To appreciate fully the lack of evidential value of this deposition, this Court must also consider the circumstances under which the deposition was procured and the fact that despite constant pressure by U. S. representatives in Manila, Diokno never signed the deposition. For more than a month Diokno refused to do so, without explanation (Tr. 36). After another two weeks, he was finally persuaded to withdraw his refusal and to substitute a waiver of signature (Pl's. Exh. 12, Certificate).

Diokno carries a long-standing personal grudge against Appellants for many reasons, including his having been dismissed by President Macapagal after, and because of the raids (RT 878) and his having been made a defendant in the Philippine litigation (Exh. AW). An ultra-Nationalist, he was, after many futile attempts, induced by Appellee's Counsel to give a deposition, only after he was shown a pleading filed by Appellants in a related case. The contents of the pleading irritated the Senator because

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* Even if there had been antecedent investigation of Appellants, it would be irrelevant in view of the holding in *Lustig* v. *U.S.*, *supra*, that it is immaterial *when* the Federal agent joins in the non-Federal enterprise. Also, the trial court may have been confused by references to a 1959 NBI investigation of another American, Ted Lewin. There is some evidence that during the Lewin investigation, NBI Director Lukban picked up Stonehill's voice on a telephone tap. (Tr. 79).

it described him as cooperating with the United States. He so admitted in his deposition and testified that Appellee's Counsel's showing him this pleading was his motivation to testify (Pl's. Exh. 12, pp. 176-177).

Diokno's credibility was thoroughly impeached. He was shown a press release (Df's. Exh. 9 to Diokno Dep'n) that he had personally authored a short time earlier, in which he denied publicly that his meeting in Hong Kong was arranged by American agents and that he had discussed the projected raids on Stonehill with Kennedy's assistant. These and other facts, denied by Diokno in his press release and again denied during the deposition, were finally admitted by him on cross-examination (Pl's. Exh. 12, pp. 165-167).

We need not cite any authority for the proposition that this Court in evaluating Diokno's testimony should consider the impeachment of his testimony on a material issue, his motives, his reluctance over a period of several months to sign the deposition, and his final failure to sign it although he originally had insisted on his right to make changes therein (Pl's. Exh. 12, p. 181).

Diokno's testimony, inadmissible, vague and biased, must be disregarded entirely, leaving most of Appellee's argument without support in the record.

CONCLUSION

For the reasons set out in Appellants' Opening Brief and in this Reply Brief, and for such other and further reasons as may be urged on this Court at the oral argument of this appeal, it is respectfully urged that an Order be entered reversing the holding of the Trial Court and directing that Appellants' Motion to Suppress be granted in its entirety.

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and Bertram H. Ross,

By Hans A. Nathan and
Bertram H. Ross
Attorneys for Appellants.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

BERTRAM H. ROSS

APPENDIX

CHRONOLOGY OF EVENTS

APPENDIX

Chronology of Events

Sometime in 1954

Internal Revenue's interest in Appellant Stonehill begins. During, and because of investigation of another U.S. taxpayer residing in Manila (Lewin), the U.S. Internal Revenue Service (IRS) accumulates file on Appellants Stonehill and Brooks in Manila and in Washington.

August, 1960

IRS, Office of International Operations in Washington, at the request of the Department of Justice, assigns Appellant Stonehill's 1958 tax return for audit to the Manila IRS office.

1961

October, November, 1961

Appellants are outside the Philippine Islands prior to, and during Philippine Presidential elections.

Approx. December 10

Informer Spielman contacts CIA representative at the U.S. Embassy in Manila (Tr. 750).*

December 16

Spielman gives statement to Consul General and Political Section of the Embassy (Exh. E).

December 17

Spielman gives statement to FBI agent Hawley and turns over to him approximately 100 documents, allegedly obtained clandestinely from Stonehill's files.

December 18

Spielman is interviewed by Agent Chandler, who makes copies of Spielman documents. Thereafter Chandler sees Spielman daily, gathering information re: Appellants' tax liabilities.

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* Tr. references in this chronology are made only if item was not previously referred to in briefs by either party.

December 22

After constant conferences with Spielman, Chandler reports to Washington that tax case against Stonehill should be made and asks for Revenue and Special Agents to be sent to Manila to assist him.

Between December 24, 1961 and December 31, 1961

NBI Director Lukban hears rumor about Spielman, inquires, but is given no information.

1962

January 9, 1962

Highest U.S. Embassy official in Manila determines as a matter of Embassy policy "to get [appellant] Stonehill out of the Philippines and to keep him out". Manila IRS (Chief Chandler needs a "spectacular" tax case to improve IRS enforcement image in the Far East, asks for experienced Special Agents to be dispatched to Manila immediately, since case against Appellants promises to be suitable for this purpose, but investigation requires additional staff.

January 10, 1962

Chandler reports to Washington that he and Hawley have "extracted all [they] could from the informant [Spielman]". Chandler and Hawley realize that what they have is "not very good evidence".

Between January 10 and January 17, 1962

Hawley and Chandler realize that "any investigation that you do through local sources abroad, you do as a matter of cooperation and permissiveness" rather than as a matter of "right and jurisdiction" (RT 1210) and that they, therefore, can go no further in gathering evidence in the Philippines. They persuade Spielman to tell his story to the NBI so as to cause action to be taken by this agency.

January 27, 1962

Secret meeting is set up at Embassy. Informer Spielman has been persuaded to tell story to NBI Director Lukban and Assistant Director Nocon.

January 27, 1962

Lukban *promises* to inquire and to investigate, but only if he could find corroboration of Spielman's story (Tr. 143).

February 1, 1962

Secret meeting is arranged at private (Columbian) club for Chandler (IRS), Hawley (FBI) and Lukban (Philippine NBI), with new Secretary of Justice Diokno. Chandler tells Diokno that U.S. has a tax case but no evidence (Tr. 158-159). Diokno does not want to "stick his neck out" by procuring evidence and demands meeting with U.S. Attorney General Kennedy.

February 4, 1962

Spielman is introduced to Secretary Diokno.

February 5, 1962

Diokno, at Lukban's request, goes to President Macapagal of the Philippines because Spielman demands assurance of investigation of Appellants from the President in exchange for his continued cooperation (Pl's. Exh. 12, pp. 14, 15, 16).

Beginning January 27, and throughout February until March 3, 1962

Daily and sometimes twice daily, meetings between U.S. agents and Philippine agents, including at times Informer Spielman, mostly held at U.S. Agent Chandler's home, discussing "modus operandi" of raids, location of documents, etc.

Approximately February 6, 1962

Secretary Diokno tells his Executive Assistant, Major Del Rosario that if any proceedings are taken against

Stonehill, they would be taken in order to help Americans make a tax case (Tr. 836). The Filipinos were not interested in a tax case (Tr. 848). Diokno insists that no action be taken until after his return from Hong Kong (Tr. 840-842).

Between February 6 and February 10, 1962

Chandler and Hawley arrange Diokno-Kennedy meeting.

February 10, 1962

Secretary Diokno leaves for Hong Kong for meeting with Attorney General Kennedy. He meets Kennedy's Executive Assistant Seigenthaler; insists on simultaneous raids in New York before authorizing searches "outside ordinary government channels" in the Philippines (Tr. 164; Df's. Exh. AZ).

February 12, 1962

Secret cable, regarding agreements reached in Hong Kong, sent by H.K. Consulate to U.S. Department of Justice, State Department, Manila Embassy and Internal Revenue Service, Washington Office of International Operations. Cable indicates that Manila searches will be authorized by Secretary Diokno (Df's. Exhs. F, AZ). Washington dispatches Ragland and Powers to Manila.

February 12, 1962

Washington telephones Chandler in Manila that requested agents are being dispatched (Tr. 238; 257 to 259; Exh. G).

February 13, 1962

Diokno returns from Hong Kong.

During February 1962

Chandler urges delay of searches until U.S. agents can get to Philippines.

February 24, 1962

Original target date for raids. Raids are postponed to give U.S. agents time to get to Manila. (Tr. 986).

Between February 12 and March 2, 1962

Chandler prepares written sketch of two Stonehill company buildings with instructions as to where to search and what to seize (Exh. J); NBI prepares picture folder of locations to be raided and Chandler writes memorandum of comments to this picture folder and instructions of how to conduct searches in locations shown on photos. (Exh. I).

Sometime prior to March 3, 1962

Chandler obtains assurance from Philippine NBI Director that records will be made available to the U.S. agents for copying as they are received. (Tr. 1004, 1005).

Between February 24 and March 2, 1962

Revenue Agent Ragland arrives from Washington and is instructed to familiarize himself with the case and obtains photographic equipment for photographing Stonehill documents expected to be seized on March 3.

March 2, 1962

Ragland is advised that the raids will take place on March 3 (Saturday) and is instructed to be at his hotel at 1:00 p.m. to be picked up by Chandler.

Late evening of March 2, into early morning of March 3, 1962

Search warrants and applications therefor are being typed by Lukban's assistant director Nocon at Lukban's private home; Chandler attends this briefing session, approves language of search warrants describing financial records to be seized and personally

suggests search be conducted for Stonehill papers at Army-Navy Club (Room 304), which location was not contemplated to be searched by the Philippine agents.

March 3, 1962, 8:00 a.m.

Secretary Diokno asks his undersecretary, as *ex officio* Chairman of the Deportation Board, to sign deportation warrants for arrest of Appellants. Deportation proceedings are selected as the mode of arrest so that Appellants will not get out on bail and interfere with searches.

March 3, 1962 beginning at 8:00 a.m.

Between 30 and 40 substantially identical search warrants are obtained from three Judges by agents who previously had no information about the case. All search warrants are later held illegal and void by the Supreme Court of the Philippines and by the U.S. District Court for the Central District of California.

March 3, 1962, about 1:00 p.m.

Appellants are arrested. Chandler and Revenue Agents Reynolds and Ragland are stationed at prearranged location (Arson Squad Building) near main NBI building. The illegal searches begin and include Room 304 Army Navy Club.

Sometime after 1:00 p.m.

Chandler observes raids on private office of Stonehill and Brooks (former Cuban Embassy) from neighboring apartment house. (Tr. 392, 393, 394).

March 3, 1962, between 1:00 p.m. and 10:00 p.m.

U.S. agents Ragland and Reynolds wait at NBI Arson Squad Building, carrying photographing and copying equipment. Chandler drives to the various raid locations but returns to to NBI Arson Squad Building from time to time.

March 3, 1962, 10:00 p.m.

The U.S. agents are called to Colonel Lukban's NBI office. They are told that the raids are still in progress and shown the first material that was seized (Tr. 400, 401). Chandler, Reynolds and Ragland drive to Stonehill-U.S. Tobacco warehouse with an NBI agent. They go and examine records there and segregate what they "thought was important" (Tr. 406; 531, 532). Chandler searches the entire place, but spends most of his time in the record vault. Tells NBI agent to bring records picked out by U.S. agents to NBI Headquarters.

March 3, 1962, approximately midnight

Chandler, Ragland and Reynolds drive to the main office of the Stonehill-Brooks U.S. Tobacco company because "NBI's execution of the raids was handled in disorganized manner". Chandler goes into the main building and points out to NBI team leader location of records. Location is subsequently searched and records are seized from location pointed out by Chandler.

March 3, 1962, after midnight

Chandler stops by Stonehill-Brooks office located in Cuban Embassy and gets report from Assistant NBI Director Nocon as to results of search (Tr. 423, 424).

March 4, 1962, Sunday

Party at FBI agent Robert Hawley's home, with Philippine and U.S. personnel present, at which party Chandler boasts about his selection of Room 304 at Army Navy Club as search target. (Tr. 427).

March 5, 1962, Monday morning between 9:00 and 10:00 a.m.

Chandler takes U.S. Revenue agents Ragland and Reynolds to NBI Director. Ragland and Reynolds are given office in NBI building to begin inspection and copying of seized documents.

March 5, 1962, 10:00 a.m. through 7:30 p.m. and every working day thereafter until sometime subsequent to March 5

Agents Ragland and Reynolds inspect and copy documents at NBI building. Records are moved to a separate building "contributed" by American businessman (Tr. 429, 430).

March 8, 1962

Special agent Powers arrives in Manila and case is assigned to him (Tr. 433).

Subsequent to March 8, 1962

Chandler, Powers and Ragland obtain Philippine NBI badges, assuring them access to building (Tr. 1159) and continue photographing and microfilming records seized during searches for months thereafter.